No. 06-1359

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In the Supreme Court of the United States

CROSSWINDS COMMUNITIES, INC.,
and BERNARD GLIEBERMAN,
Petitioners,

v.

MICHAEL A. CHIRCO and DOMINIC MOCERI,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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SUMMARY OF THE ARGUMENT

Petitioner misstates the proceedings below. The District Court did not enter a final judgment, pursuant to Rule 52, F.R.Civ.P. It granted summary judgment pursuant to Rule 56, F.R.Civ.P.

The District Court's grant of summary judgment was clearly erroneous because (1) the District Court resolved factual issues against respondents, the non-moving parties, and (2) the District Court used the wrong legal standard.

The Sixth Circuit's decision is confusing and without clear direction because, on the one hand, the Sixth Circuit correctly recognized that laches will not generally apply to statutory claims which are brought within the statutory limitations period. In doing so, it followed this Court's guidance in *Holmberg v. Armbrecht*, 327 U.S. 392, 395 (1946). *See also United States v. Mack*, 295 U.S. 480, 489 (1934); *Oneida County v. Oneida Indian Nation of New York*, 470 U.S. 226, 244-245 n. 16 (1985).

However, the Sixth Circuit also concluded that an exception should apply if "the relief sought will work an *unjust* hardship upon the defendants or upon innocent third parties. . . ." App. at 36a.

The Sixth Circuit reached this hybrid result based on its views that:

> . . . the courts, as a co-equal branch of the federal government, must ensure that judgments never envisioned by the legislative drafters are not allowed to stand.

This conclusion, in the proper circumstances, would merit review by this Court. However, in this case, the Sixth Circuit's decision lacks both clarity and finality. The Sixth Circuit reversed for further proceedings to determine whether Respondents claimed relief which was not barred by laches.

Respondents clearly sought a variety of relief, including statutory damages and injunctive relief which would not be foreclosed under the Sixth Circuit's rule. Therefore, review by this Court is premature.

However, if this Court decides to review the Sixth Circuit's decision, then it should reject the Sixth Circuit's hybrid approach and adopt a bright line rule that their claims brought within the three year limitations period in Section 507(b) of the Copyright Act, 17 U.S.C. § 507(b), cannot be barred by laches.

COUNTER-STATEMENT OF PROCEEDINGS

Plaintiffs-Appellants Michael A. Chirco and Dominic Moceri are in the business of developing real estate, including condominiums and single family homes in the metropolitan Detroit area. App. at 137a.

Plaintiffs are exclusive licensees of copyrights for architectural plans and architectural works for condominiums commonly known as the Aberdeen condominiums (the "Aberdeen copyrights"). App. at 2a.

Plaintiffs commenced an action in the United States District Court for the Eastern District of Michigan on April 10, 2001, claiming that certain Defendants — including Bernard Glieberman — had infringed the Aberdeen copyrights by developing a condominium project in Waterford, Michigan

(the "Waterford Condominiums"). App. at 1a-2a. The complaint in the First Lawsuit asked the court to grant relief expressly authorized by the Copyright Act, including an injunction against future infringement, including the building or selling of condominiums based on the copyrighted architectural plans; impoundment and destruction of infringing copies; and a money judgment in accordance with 17 U.S.C. § 1117. *See, e.g.*, App. at 130a, 141a .

Thus, the complaint in the First Lawsuit sought relief which gave express notice that Plaintiffs would proceed against the Defendants not only for the original Waterford Condominiums but for any additional development which infringed Plaintiffs' copyrights.

On January 21, 2003, Defendants in the First Lawsuit filed various motions for summary judgment seeking to dismiss all or part of the complaint in the First Lawsuit. Mr. Glieberman individually moved for summary judgment claiming that he could not be liable for the actions of the defendant corporate entities.

The District Court heard these motions on March 12, 2003.

On October 10, 2003, the District Court issued its Order and Opinion in the First Lawsuit which denied Defendants' motions for summary judgment. The District Court specifically found that Mr. Glieberman controlled and dominated the corporate entities and could be jointly and severally liable for their infringement. App. at 3a.

Plaintiffs could have pursued the Jonathan's Landing claims by moving to amend the Charter Oak complaint. Pursuant to Rule 15(c), F.R.Civ.P., the Jonathan's Landing

claims would relate back to the date the original complaint was filed. Plaintiffs concluded, however, that moving to amend would likely further delay proceedings and involve additional briefing which would burden the court. Plaintiffs were cognizant of the fact that the District Court had taken months to decide prior motions. App. at 129a-130a.

To avoid the delays and burdens of additional motions, on November 14, 2003, Plaintiffs filed a separate complaint challenging the Howell Condominiums. Plaintiffs knew that, under the Local Rules for the Eastern District of Michigan, the Second Lawsuit would be assigned to Judge Hood as a related case. *See* E.D.Mich. L.R. 83.11(b)(7) (addressing "companion cases"). App. at 2a, 136a.

The Second Lawsuit claimed that Mr. Glieberman and his alter ego, Crosswinds Communities, had infringed the Aberdeen copyrights by developing a condominium project in Howell, Michigan (the "Howell Condominiums"). App. at 136a. The complaint in the Second Lawsuit recognized, and relied on, the fact the First Summary Judgment motion had found Mr. Glieberman could be held jointly and severally liable for the actions of the entities which he controlled and dominated. App. at 129a-130a.

Defendants refiled summary judgment motions in the First Lawsuit on April 1, 2004. App. at 16a. They also filed a motion for summary judgment, pursuant to Rule 56(c), to dismiss the Second Lawsuit on grounds of laches. Defendants argued that Plaintiffs had waited 18 months after they knew of the Howell Condominiums before starting the Second Lawsuit and Defendants were prejudiced by the delay.

The Court heard arguments on these motions on July 21, 2004. App. at 122a.

On March 31, 2005, the District Court issued an Opinion and Order in both Lawsuits, which again denied the motions for summary judgment in the First Lawsuit but granted summary judgment dismissing the Second Lawsuit on grounds of laches. In deciding that Plaintiffs were guilty of laches, the District Court referenced the fact that Crosswinds Communities had not been a defendant in the First Lawsuit, but it ignored the fact that Bernard Glieberman was a defendant in the First Lawsuit and the Second Lawsuit and that, in the First Lawsuit, the District Court had found that Mr. Glieberman could be jointly and severally liable for the infringing actions of the corporate entities, including Crosswinds, which he controlled and dominated. App. at 17a-19a.

The District Court also found that "Defendants had no notice that Plaintiffs were going to sue them regarding this project." App. at 19a. In doing so, the District Court exceeded its powers in deciding a Rule 56 motion, and it ignored the prayer for relief in the original complaint which sought an injunction any future infringements based on the Aberdeen Plans.

The District Court entered a judgment dismissing the Second Lawsuit on March 31, 2005. App. at 21a.

Pursuant to 28 U.S.C. § 1292(a), Plaintiffs filed an appeal as a matter of right from the district court's summary judgment dismissing Plaintiffs' Complaint. The appeal was docketed as appeal number 05-1715. On January 10, 2007, the Sixth Circuit issued its opinion in this matter. App. at 23a.

The Sixth Circuit applied a de novo standard of review because it was "presented with a threshold question of law as

to whether the laches doctrine is even applicable in a particular situation. . . ." App. at 27a.

The Sixth Circuit did not address the issue presented by Petitioner, namely, whether it should review the District Court's factual conclusions under a Rule 52 standard or a Rule 56 standard.

The Sixth Circuit then concluded, as a matter of law, that claims for money damages or injunctive relief will, except in unusual circumstances, not be barred by laches if they are brought within the three year limitations period established by the Copyright Act.

Applying a de novo standard of review, the Sixth Circuit first determined the availability of the laches defense in a copyright infringement case as it relates to the Copyright Act's explicit three year statute of limitations provision, 17 U.S.C. §507(b). Again, applying a de novo standard of review, the appellate court reversed the district court's judgment, but affirmed the district court's determination that Plaintiffs' inordinate lengthy delay in filing this suit makes any effort to procure the destruction of buildings already occupied, sold, or substantially constructed unduly prejudicial to Defendants. App. at 35a-36a.

REASONS FOR DENYING THE PETITION

I. The Sixth Circuit Did Not Apply The Wrong Standard Of Review

Petitioner's first reason for seeking a writ makes no sense under the record below. Petitioner argues that the Sixth Circuit should have used the standard of review applicable to factual findings under Rule 52, F.R.Civ.P.

This ignores what the District Court decided and what the Sixth Circuit decided.

The District Court did not purport to use its equitable powers to determine an equitable remedy; instead it decided a summary judgment motion in case seeking statutory remedies under the Copyright Act. *See Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 949 (10th Cir. 2002) ("Although a district court can make factual findings related to laches after a bench trial, the court should not make factual findings when addressing a summary judgment motion based on laches. Rather than deferring to district court's finding of fact, we view the record in the light most favorable to Dr. Jacobsen." [internal citations omitted]).

The Sixth Circuit decided to use a *de novo* standard of review because it was deciding a threshold issue of law. Petitioner cites no cases which apply some other standard for deciding threshold legal issues, even when reviewing factual findings made pursuant to Rule 52. On the contrary, as this Court explained in *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 502 (1984):

> Rule 52(a) applies to findings of fact, including those described as "ultimate facts" because they may determine the outcome of litigation. But Rule 52(a) does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law. [Citation omitted.]

See also Overton Distribs., Inc. v. Heritage Bank, 340 F.3d 361, 365-66 (6th Cir.2003) ("This court reviews the district

court's conclusions of law de novo and findings of fact for clear error").

Even the cases cited by Petitioners demonstrate that the abuse of discretion standard applies only where the District Court makes equitable determinations based on undisputed facts. The abuse of discretion standard does not apply to cases reviewing an order granting summary judgment where the district court has inappropriately resolved disputed factual issues and make errors of law. *See Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 835 (9th Cir.2002) ("whether the district court inappropriately resolved any disputed material facts in reaching its decision" is reviewed under the de novo standard that traditionally governs summary judgment review).[1]

II. The Sixth Circuit Correctly Recognized That Laches Cannot Bar The Claims For Monetary and Injunctive Relief, But It Erroneously Concluded That Courts Can Disregard Statutory Limitations Periods In Extraordinary Situations

Respondents agree that the Sixth Circuit got it wrong in an important respect. Respondents, however, do not believe that the Sixth Circuit's legal error merits review by this Court at this time because the Sixth Circuit remanded for further proceedings which may moot any review by this Court.

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[1] *See Hot Wax, Inc. v. Turtle Wax, Inc.*, 191 F.3d 813, 819 (7th Cir.1999) ("our review of the record is de novo in determining whether there are any disputed issues of material fact").

A. The Statute Of Limitations Under The Copyright Act

Section 507(b) of the Copyright Act, 17 U.S.C. § 507(b), provides:

> (b) Civil Actions. — No civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued.

B. Laches Should Not Be Available In This Case Because The Complaint Was Filed With The Statutory Limitations Period

As this Court stated in *Holmberg*, 327 U.S. at 395:

> If Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter. The Congressional statute of limitation is definitive.

See also United States v. Mack, 295 U.S. 480, 489 (1934) ("[L]aches within the term of the statute of limitations is no defense at law."); *Oneida County v. Oneida Indian Nation of New York*, 470 U.S. 226, 244-245 n. 16 (1985) ("application of the equitable defense of laches in an action at law would be novel indeed").[2]

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[2] This principle has been applied in a variety of other statutory contexts. *See, e.g., Ashley v. Boyle's Famous Corned Beef Co*, 66 F.3d 164, 170 (8th Cir.1995) (Title VII and Equal Pay Act claims), where the Eighth Circuit stated that "separation of powers principles dictate that federal courts not apply laches to bar a federal statutory claim that is timely filed under an express federal statute of limitations." The Eight Circuit stated that an express

The Sixth Circuit called the language in *Holmberg* dicta, and, instead, fashioned its own rule which recognized that, most of the time, laches would not bar claims brought within the statutory limitations period. However, it decided that, in extraordinary circumstances, "the courts, as a co-equal branch of the federal government, must ensure that judgments never envisioned by the legislative drafters are not allowed to stand." App. at 36a.

Nevermind that the Sixth Circuit never explained how it determined what the legislative drafters envisioned, the Sixth Circuit provides no guidance for deciding what is an "unusual case" where laches should be allowed to trump the legislative's limitations period.

The Sixth Circuit found support in decisions of other circuits which also allowed laches to trump the statutory limitations period in extraordinary circumstances. *See Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 950-951 (10th Cir. 2002) ("courts should generally defer to the three-year statute of limitations"), and *Danjaq LLC v. Sony Corporation,* 263 F.3d 942, 954 (9th Cir. 2001) ("If a defendant can show harm from the delay, the court may, in extraordinary circumstances, defeat the claim based on laches, though the claim is within the analogous limitations period").

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limitations period "reflect[s] a legislative 'value judgment'" striking the appropriate balance between the interests promoted by the statute and countervailing interests of repose. *Ashley*, 66 F.3d at 169 (quoting *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 463-464 (1975). *See also Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583, 586 (9th Cir.1993) ("[b]ecause Congress provided a statute of limitations to govern ADEA actions . . . [those] claims cannot be barred by laches"), *cert. denied*, 510 U.S. 1109, 114 S.Ct. 1049, 127 L.Ed.2d 372 (1994).)

The Sixth Circuit also recognized, but did not adopt the bright-line rule, adopted by the Fourth Circuit in *Lyons Partnership LP v. Morris Costumes, Inc.*, 243 F.3d 789, 797 (4th Cir. 2001):

> In *Lyons*, the Fourth Circuit observed:
>
> > While we agree with Lyons that the district court erred as a matter of law when it found that laches barred Lyons' claims, both legal and equitable, we do so for more fundamental reasons. First, laches is a doctrine that applies only in equity to bar equitable actions, not at law to bar legal actions. Second, we note that, in any event, in connection with the copyright claims, separation of powers principles dictate that an equitable timeliness rule adopted by courts cannot bar claims that are brought within the legislatively prescribed statute of limitations. Finally, even in equity under the Lanham Act, laches does not bar a claim for prospective injunctive relief. [243 F.3d at 797]

Because the Sixth Circuit remanded for further proceedings which may render review by this Court moot or premature, the court should not grant the petition.

However, if the Court does so, it should reverse the Sixth Circuit and declare, as a matter of law, what it has previously stated in *Holmberg*:

> If Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter. The Congressional statute of limitation is definitive.

III. Defendants' Calculation Of Delay Distorts The Record And Ignores The Lengthy Period That The District Court Kept The Summary Judgment Motions Under Advisement

While not directly relevant to whether the petition should be granted, Petitioner offers a grossly misleading description of the evidence relating to delay. Therefore, pursuant to Supreme Court Rule 15, Respondents are compelled to explain why the delay — within the limitations period — was appropriate in the circumstances.

Defendants contend that Plaintiffs waited 2 years and 1 month after first learning about the Jonathan's Landing project before filing the Second Lawsuit. But this is grossly misleading.

First, and most obviously, this contention ignores the fact that the summary judgment motions were pending for almost 10 months; and Respondents knew that there would be summary judgments for many months before those motions were filed. By reasonably awaiting a decision on the summary motions in the First Lawsuit before they commencing suit on the Howell project, Plaintiffs promoted efficiency and judicial economy. The plans and buildings at issue were virtually identical. Plaintiffs reasonably concluded that a decision on the Waterford project would provide guidance which, if the District Court ruled in plaintiffs' favor, might lead to settlement of all issues between Plaintiffs and Defendants and, if the District Court ruled in Defendants' favor, might cause Plaintiffs to forego further litigation.

Second, Defendants' calculation of the alleged 2 year and 1 month delay starts at the wrong beginning. Defendants' relied on a FOIA request which discovered that Defendants

had sought approval for their project. Approval of a project is quite different than construction of a project. Until Defendants actually commenced construction, it would have been uneconomical for Plaintiffs to pursue litigation — especially when the rights in the copyrighted plans and architectural works were already being litigated.

In *Lottie Joplin Thomas Trust v. Crown Publishers, Inc.*, 456 F.Supp. 531, 534 (S.D.N.Y.1977), *aff'd*, 592 F.2d 651 (2d Cir.1978), the rights to a Scott Joplin song had been wrongfully assigned to a publishing company in 1959. Counsel for the plaintiff trust learned about the assignment in 1967. The publishing company released a recording of the song in 1974. The court held that the trust was not barred by laches from pursuing an infringement claim. It explained in part that the trust's delay was not unreasonable, because "[c]ounsel to the Trust could have reasonably concluded that," prior to the time the movie "The Sting" brought Joplin's works to prominence, "enforcement of the copyright was not worth the cost of litigation, especially because no infringing phonograph record was on the market." 465 F.Supp. at 534.

Here, Plaintiffs wanted to prevent infringing construction. Seeking site approval based on the infringing plans did not necessarily mean that Defendants would actually construct condominiums based on those infringing plans, especially while a lawsuit challenging Defendants' infringing construction of the Waterford project was pending. Prematurely suing merely because Defendants had sought site plan approval would almost surely have occasioned costly litigation raising issues of ripeness and damages.

Under the circumstances, Defendants were not unreasonable when they waited until the District Court

decided the summary judgment motions in the First Lawsuit before commencing the Second Lawsuit. At a minimum, whether Defendants were unreasonable created a factual issue which could not be resolved by summary judgment. *See Kourtis v. Cameron*, 419 F.3d 989, 999 (9th Cir. 2005) (because a claim of laches depends on a close evaluation of all the particular facts in a case, it is seldom susceptible of resolution by summary judgment); *A.C. Aukerman Co. v. R.L. Chaides Construction Co.*, 960 F.2d 1020, 1028 (Fed.Cir.1992) (emphasizing that the party claiming laches must prove both unreasonable and inexcusable delay and observing that delay in filing patent infringement suit may be excused by host of factors, including involvement in other litigation).

CONCLUSION

The petition for a writ of certiorari should be denied. If the Court grants the petition, it should limit review to the question whether laches can bar a claim for statutory remedies brought within the statutory limitations period.

Respectfully Submitted,

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